3959

LOWENSTEIN, SANDLER, BROCHIN, KOHL & FISHER
744 BROAD STREET
NEWARK, N. J. 07102

TELEPHONE
201 624-4600

ALAN V. LOWENSTEIN
RICHARD M. SANDLER
MURRY D. BROCHIN
BENEDICT M. KOHL
ARNOLD FISHER
JOSEPH LEVOW STEINBERG
MATTHEW P. BOYLAN
BRUCE D. SHOULSON
JOHN R. MACKAY 2ND
MURRAY J. LAULICHT
ARCHIBALD S. ALEXANDER, JR.
MARTIN R. GOODMAN
JOHN D. SCHUPPER
STEPHEN N. DERMER

WILLIAM T. KNOX IV
MICHAEL L. RODBURG
ALLEN B. LEVITHAN
R. BARRY STIGER
GREGORY B. REILLY
DAVID W. MILLS
MELVIN GREENBERG
PETER H. EHRENBERG
BARBARA BYRD WECKER
ALLAN G. TRAPUNSKY
LEWIS J. PAPER
STANLEY A. EPSTEIN
FRANCO GARCIA
RONALD H. JANIS

December 7, 1976

Clerk
United States District Court
For the District of Columbia
U.S. Courthouse
4th and Constitution Avenues, N.W.
Washington, D.C. 20001

Re: Sam and Juene Jaffe v. Central Intelligence Agency and Department of Justice
Civil Action No. 76-1394

Dear Sir:

Enclosed please find an original and two copies of plaintiffs' Opposition to Defendants' Motion for a Protective Order in the above-referenced matter.

I would very much appreciate it if you could file the original and one copy of the Opposition and return the second copy to me marked "Received" in the enclosed self-addressed, envelope.

Respectfully yours,

Lewis J. Paper

LJP/cjj
Enc.
cc: Lawrence T. Bennett, Esq.
Hon. Edward Levi
Hon. George Bush

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAM and JUENE JAFFE,	:	
Plaintiffs,	:	Civil Action No. 76-1394
-v-	:	OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER
CENTRAL INTELLIGENCE AGENCY and DEPARTMENT OF JUSTICE,	:	
Defendants.	:	

On or about December 3, 1976, defendants filed a Motion for a Protective Order to stay the taking of the depositions proposed by plaintiffs, as well as all other discovery in the instant action, pending the disposition of a Motion to Dismiss, or in the Alternative, for Summary Judgment, which defendants state they will file on or about December 8, 1976.*

Plaintiffs oppose defendants' Motion for a Protective Order and further state that, at the appropriate time, plaintiffs will move that the time for plaintiffs to respond to defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, not begin to run at least until this Court rules on the motion which plaintiffs filed pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), or until plaintiffs have filed their response to an affidavit that defendant Department of Justice intends to file on December 8, 1976,

* Plaintiffs are seeking to take the depositions of agency officials who filed affidavits on November 9, 1976, to support defendants' opposition to plaintiffs' Vaughn motion.

whichever date is later. In support of plaintiffs' opposition to the Motion for Protective Order, the following is stated:*

Defendants' sole basis for opposing depositions and other discovery by plaintiffs is defendants' contention that they have satisfied their Vaughn obligations and that the instant matter can now be disposed of on the merits by the Court. Defendants state, however, that if ". . .plaintiffs disagree with this conclusion upon the receipt of the next affidavit [to be submitted by the Federal Bureau of Investigation], we suggest that they state with precision (such as by Interrogatory) the nature of the further discovery that they see, so that we can evaluate their request and appropriately respond to it."

As explained in the Supplementary Reply filed by plaintiffs on or about December 6, 1976 and incorporated herein by reference, plaintiffs do not believe that defendants have fulfilled their Vaughn obligations. That Supplementary Reply discusses numerous instances in which the information supplied by defendants is so conclusory as to preclude any adversary testing of defendants' assertions that they have supplied plaintiffs with all records subject to disclosure under the Freedom of Information Act, 5 U.S.C. §552.

Plaintiffs obviously have not yet seen the additional affidavit which the Federal Bureau of Investigation (hereinafter "FBI") plans to submit on December 8, 1976. Counsel for defendants represented at oral argument on November 30, 1976 that the

* Plaintiffs have prepared this Opposition without having seen copies of the actual documents presumably filed by defendants on the Motion for a Protective Order. However, defendants' counsel's office dictated the contents of those documents to plaintiffs' counsel's office, and that dictation has been reviewed prior to the filing of this opposition.

document would be quite lengthy, and, on that basis, the Court gave plaintiffs until December 20, 1976 to file an analysis of that additional affidavit. In any event, it is impossible for plaintiffs to take a position with respect to the adequacy of the information to be supplied by that additional affidavit. Similarly, plaintiffs are unable at this point to comment on the effect of their receipt of the additional FBI records that defendants say they will give to plaintiffs. (See Schweikhardt Affidavit at 3, ¶9.)

It is likewise difficult for the Court to issue any ruling on plaintiffs' Vaughn motion that depends on the information to be included in the FBI's affidavits or the additional FBI records to be given to plaintiffs. Even if the Court should grant plaintiffs' Vaughn motion, plaintiffs expect that they will need additional discovery to understand fully the procedures employed by the defendants and to understand fully the nature of the conclusions they drew in deciding to withhold certain records requested by plaintiffs. Thus, both the CIA and the FBI make much of their need to protect the confidentiality of sources. (Schweikhardt affidavit at 14-16; Briggs affidavit at 7-9.) It is well established, however, that a claim of confidentiality -- even when the source himself has been assured confidentiality -- is not sufficient alone to exempt material from the general disclosure requirements of the FOIA. (Robles v. Enviromental Protection Agency, 484 F.2d 843, 847 (D.C.Cir. 1973).) Even with the additional information that could be expected if the Court grants plaintiffs' Vaugh motion, it is expected that plaintiffs will have to explore further the procedures defendants used to determine that specific records relate to a confidential source, that a

particular source was given a promise of confidentiality, and that release of a specific record will somehow impair defendants' ability to secure information they need to fulfill their lawful obligations.

These questions can be of particular benefit to plaintiffs. They are anxious to gain access to material concerning secret charges made by Yuri Nossenko, a Soviet defector, that plaintiff Sam Jaffe was a KGB agent. Plaintiffs are also anxious to gain access to records concerning defendants' use of plaintiff Sam Jaffe as an informant, to some extent without his knowledge. Since the print and broadcast media have already given broad public exposure to Mr. Nossenko's allegations and charges of plaintiff Sam Jaffe's use as an American agent, plaintiffs will want to know how records concerning those matters were characterized and why they must remain secret. (See esp. e.g. FBI Documents 184, 185, withheld in part because they relate to a characterization of an informant -- who might be plaintiff Sam Jaffe.) This kind of inquiry seems especially appropriate since neither the FBI nor the CIA has provided specific justifications for all portions of requested records. (E.G. FBI Document 191, Schweikhardt affidavit at 43. See Plaintiffs' Supplementary Reply of December 6, 1976 at 4-7, 9-10.)

Other assertions of the FBI and CIA also must be tested under further discovery. The CIA (through the affidavit of Charles Briggs) maintains that certain records fall within the exemption under 5 U.S.C. §552(b)(1) on the grounds that disclosure of such information would damage the national security. Discovery, it is expected, will be needed to test the procedures that were used to make that determination. Mr. Schweikhardt states on behalf of the FBI that information concerning "search slips," "leads," and "trans-

mittal letters" cannot be disclosed because they involve deliberative processes and would hamper the FBI'S ability to operate. Given the fact that more than 350 FBI records, consisting of more than 1000 pages, are covered by plaintiffs' FOIA request, plaintiffs want, and should receive, the opportunity to find out how the FBI made its various determinations on these and other points with respect to that material.

In the end, the Court should exercise its discretion to provide a plaintiff in an FOIA lawsuit with as much information in the pre-trial stage as would be consistent under the law. As the Vaughn Court made clear, the government has a tremendous advantage in arguing that certain records not be disclosed. That advantage is, of course, magnified when, as here, the agency relies heavily upon such vague notions as "national security".

These considerations recently compelled the Court of Appeals in this circuit to reverse a lower court decision granting summary judgment in favor of the Central Intelligence Agency. (Philiippi v. CIA, No. 76-1004 (D.C. Cir. November 16, 1976).) In Phillippi, the CIA relied upon "national security" considerations in refusing to confirm or deny the existence of a requested record under the FOIA. The Court of Appeals ordered the CIA to submit an affidavit "explaining in as much detail as is possible the basis for its claim. . ." The Court then stated as follows:

> The Agency's argument should then be subject to testing by appellant, who should be allowed to seek appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which that position was established. (Slip op. at 8.)

Here, too, plaintiffs should be given leeway to establish as complete a record as possible. Such a record will not only fa-

cilitate plaintiffs' analysis of defendants' arguments that they have supplied all records subject to the disclosure requirement of the FOIA; such a complete record will also facilitate this Court's ultimate decision as to whether defendants have completely satisfied their obligations under the FOIA. Given the vast amount of material involved in the instant action, the establishment of this complete record is of obvious importance.

Since depositions are the most effective and most efficient method of discovery for the inquiry described herein, plaintiffs should be allowed to use depositions. Interrogatories will only further delay a matter that has already been delayed too much.

CONCLUSION

WHEREFORE, plaintiffs respectfully request that defendants' motion be denied.

Respectfully Submitted,

Lewis J. Paper
744 Broad Street
Newark, New Jersey 07102
(201) 624-4600

Jack Novik
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Jerry J. Berman
122 Maryland Avenue, N.E.
Washington, D.C. 20002

Attorneys for Plaintiffs

December 7, 1976

CERTIFICATION

I, LEWIS J. PAPER, hereby certify that I have this 7th day of December, 1976, served copies of plaintiffs' Opposition to Defendants' Motion for a Protective Order by mailing the same, via certified mail, return receipt requested, to the following parties:

Lawrence T. Bennett, Esq.
Assistant United States Attorney
Counsel for Defendants
U.S. Courthouse - 3411
Washington, D.C. 20001

Hon. Edward Levi
Department of Justice
Washington, D.C. 20535

Hon. George Bush
Central Intelligence Agency
Washington, D.C.

Lewis J. Paper

	UNCLASSIFIED		CONFIDENTIAL		SECRET

EXECUTIVE SECRETARIAT

Routing Slip

TO:		ACTION	INFO	DATE	INITIAL
1	DCI				
2	DDCI				
3	S/MC				
4	DDS&T				
5	DDI				
6	DDA				
7	DDO				
8	D/DCI/IC				
9	D/DCI/NIO				
10	GC	X			
11	LC				
12	IG				
13	Compt				
14	D/Pers				
15	D/S				
16	DTR				
17	Asst/DCI				
18	AO/DCI				
19	C/IPS				
20					
21					
22					
	SUSPENSE		Date		

Remarks:

25X1A

9 December 1976

Date

3637 (1-73)

IG #49